86-3510

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ST. CHARLES
and FRED T.L. NORRIS, Mayor,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION,
KATHRYN GIUNTOLI and JOAN MARKLEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court fashioned a three-pronged test to analyze whether financial assistance by government to church-related schools violated the Establishment Clause of the First Amendment. *Lynch v. Donnelly*, 465 U.S. 668 (1984), applied the *Lemon* analysis in the context of a municipal creche display of the birth of Jesus Christ, and held that display of the creche during the Christmas holiday did not violate the Establishment Clause. The questions presented by this case are:

1. Whether illumination of strings of lights in the shape of a cross on a municipal fire station radio/TV antenna and crossbar brace for a month as one part of a city's traditional, award-winning, commercially successful Christmas holiday lighting display violates the Establishment Clause of the First Amendment by impermissibly advancing or inhibiting religion and fostering excessive entanglement between government and religion.

2. Whether application of the three-part purpose, effect, and entanglement test of *Lemon* should be discarded or reformulated to provide clarity and predictability to the lower courts and governmental decision-makers in the context of government conduct challenged under the Establishment Clause.

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CONSTITUTIONAL PROVISIONS INVOLVED:

First Amendment to the United States Constitution 2

IN THE

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OCTOBER TERM, 1986

CITY OF ST. CHARLES
and FRED T.L. NORRIS, Mayor,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION,
KATHRYN GIUNTOLI and JOAN MARKLEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners City of St. Charles and Fred T.L. Norris, Mayor, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. The Court of Appeals entered an order on June 6, 1986, affirming the entry of a preliminary injunction by the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit affirming the judgment of the district court is reported at 794 F.2d 265 (7th Cir. 1986). The opinion of the

Seventh Circuit is reprinted in the Appendix hereto, at pp. 1a-21a. The opinion of the United States District Court for the Northern District of Illinois entering a preliminary injunction is reported at 622 F. Supp. 1542 (N.D. Ill. 1985). The opinion of the district court is reprinted in the appendix hereto, at pp. 22a-32a.

JURISDICTION

Respondents brought their action in the district court invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1343. On December 5, 1985, the district court granted respondents' motion for a preliminary injunction. On petitioners' appeal, the Seventh Circuit entered judgment and opinion on June 6, 1986, affirming the decision of the district court. Petitioners filed this petition for a writ of certiorari within 90 days. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America, applicable to the states under the Fourteenth Amendment, provides in pertinent part that:

> "Congress shall make no law respecting an establishment of religion. . . ."

STATEMENT OF THE CASE

1. Facts

Respondents Kathryn Giuntoli and Joan Markley, members of the American Civil Liberties Union, filed suit with the ACLU against petitioners City of St. Charles and Mayor Fred T.L. Norris pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of Illinois on November 28, 1985. Respondents sought declaratory and injunctive relief prohibiting the City of St. Charles from including in its traditional Christmas holiday lighting display an illumination of strings of lights on a radio/TV antenna and crossbar brace atop the roof of the fire station located in petitioners' downtown municipal complex. Respondents alleged that the strings of lights formed a cross-like shape when illuminated, that this part of petitioners' traditional Christmas holiday lighting display had no secular purpose and effect, and that illumination of the strings of lights on the radio/TV antenna and crossbar brace during the Christmas holiday season violated the Establishment Clause of the First Amendment.

At a hearing before the district court, respondent submitted evidence that the radio/TV antenna is a permanent and functional structure consisting of a thirty-five-foot tower with a crossbar brace slightly above its midpoint. The antenna and crossbar brace are used as a television antenna, weather station, and radio center. Located in downtown St. Charles, a city of 18,300 residents in Kane County, Illinois, the fire station is part of a six-acre municipal complex also consisting of a municipal center, city electrical facility, public safety building, and planning and public works building.

Petitioners have sponsored a Christmas lighting display in the six-acre municipal complex for the past fifteen years to celebrate the holiday season, brighten spirits, and attract residents and tourists to the downtown area. All trees in the six-acre municipal complex are illuminated with small white lights during the traditional Christmas holiday lighting display (from late November through the first week of January). Frontage for a distance of twelve blocks abutting the municipal complex along the north side of Main Street/Illinois Route 64 is decorated with illuminated six-foot Christmas trees and lights affixed to streetlight poles. The illuminated Christmas trees along Main Street stretch from the crest of one end of the valley of the Fox River, where St. Charles is located, to the crest of the other end of the valley. The illuminated decorations also appear on the lamp posts on the Illinois Street Bridge that spans the Fox River, one block south of Main Street.

In addition to the lighted decorations and displays on the streets and bridge, each structure in the six-acre municipal complex is adorned with traditional Christmas holiday lighting displays and decorations. The two-story municipal center at the southwest corner of the complex is decorated with a large lighted wreath with a red bow and animated Christmas scenes. A two-story tower on top of the municipal center is illuminated with a series of red, green, and blue lighting configurations that are visible for miles and reflect off the Fox River (immediately west of the complex). This tower is the focal point of the city-wide lighting display by virtue of its size, location, and reflection off the river.

The two-story planning and public works building (to the northeast of the municipal center) is also adorned with lighted snowflakes, a snowman, and a Santa Claus. Likewise, the public safety building near the northerly edge

of the municipal complex is decorated with multicolored lights along its roof line, and with a twenty-foot Christmas tree consisting of strings of green lights and topped with a white lighted star. Photographs of the lighting displays and decorations at the locations and buildings described above are contained in the trial record.

The city's fire station, located eighty feet northeast of the municipal center, is decorated on its walls with lighted wreaths, strings of multicolored lights, and illuminated snowflakes. Volunteer firemen decided to include the communications tower atop the fire station in the traditional Christmas lighting display by installing strings of white lights on the radio/TV antenna and crossbar brace. This aspect of the traditional Christmas lighting display has a configuration of a cross-like shape. The volunteer firemen maintain the strings of lights on the radio/TV antenna on their own time and at their own expense. A private citizen donated the money to defray the costs of electricity to illuminate the strings of lights on the radio/TV antenna; the donation was $23.65, which covered the costs during the holiday display for the period of late November 1984 to January 2, 1985.

Respondents testified during the hearing before the district court that the traditional Christmas lighting display recognized the Christmas season and brought more tourists to the downtown area. Respondents objected to the illumination of strings of lights on the radio/TV antenna and crossbar brace as crass commercialism and an offensive religious symbol. Respondents admitted that the functional aspect of the radio/TV antenna and crossbar brace in its unilluminated state was not objectionable, but only allegedly unconstitutional for a few hours each evening when lit. *See* Appendix, at p. 33a (Exhibit 2/photo of unilluminated radio/TV antenna and crossbar brace).

Petitioner Norris, Mayor of St. Charles, testified that the traditional Christmas lighting display is only of one month's duration each Christmas holiday season, and that the radio/TV antenna and crossbar brace was not erected for a religious purpose. The radio/TV antenna—when devoid of lights for eleven months a year and when illuminated with strings of lights for one month during the Christmas season—always has a cross-like shape by virtue of its permanent crossbar brace, and has been utilized exclusively for reception of television channels, recording weather data, and scanning radio signals. Petitioner Norris also testified that the illumination of strings of lights on the radio/TV antenna and crossbar brace was a Christmas symbol similar to the City's display of lighted wreaths, snowmen, and stars. Though the cross has religious as well as secular significance, petitioner Norris testified that St. Charles had no purpose to promote any particular religion by including the illumination of strings of lights on the radio/TV antenna and crossbar brace in the city's traditional award-winning, commercially successful Christmas holiday lighting display.

2. Proceedings Below

The district court granted a preliminary injunction in favor of respondents on December 5, 1985. With respect to the second prong of the three-part purpose, effect, and entanglement test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the district court held that inclusion of the illumination of strings of lights on the city's radio/TV antenna and crossbar brace violated the Establishment Clause because it "has the effect of conveying an association with or tacit approval of Christianity. . . ." *See* Appendix, at p. 30a.

On appeal, the Seventh Circuit affirmed. In an opinion authored by Circuit Judge Richard A. Posner, the court held that illumination of strings of lights on the radio/TV antenna and crossbar brace "dramatically conveys a message of governmental support of Christianity. . . ." *See* Appendix, at p. 9a. The Seventh Circuit distinguished this Court's ruling in *Lynch v. Donnelly*, 465 U.S. 668 (1984), that a Christmas creche display of the birth of Jesus Christ does not violate the Establishment Clause; Judge Posner acknowledged that although the cross, stars, wreaths, and Christmas trees in petitioners' traditional Christmas holiday lighting display have religious significance, all the decorations except the cross have lost their "religious connotations for most people. . . ." while the "cross is . . . an ancient and vasiform religious symbol. *See* Blake, The Cross (1888)." *See* Appendix, at p. 10a. The Seventh Circuit interpreted *Lynch* as allowing inclusion of a creche in a municipal Christmas display "to serve a secular purpose—'celebration of a public holiday with traditional symbols'. . . ." *See* Appendix, at p. 11a. Circuit Judge Posner determined that petitioners' traditional Christmas holiday lighting display violated the First Amendment because the "cross is either a secular decoration, in which event there are many equally or more decorative substitutes at hand, or an attempt to establish Christianity as the officially recognized religion of St. Charles." *See* Appendix, at p. 18a.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S RIGID, ABSOLUTIST VIEW OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT IS INCONSISTENT WITH THE DECISIONS OF THIS COURT, CONTRARY TO THE HISTORICAL UNDERPINNINGS OF THE ESTABLISHMENT CLAUSE, AND A STILTED OVERREACTION TO A PASSIVE AND LEGITIMATE FORM OF OBSERVANCE OF THE CHRISTMAS HOLIDAY SEASON.

The contours, purpose, and focus of the Establishment Clause are at issue in this case, and warrant this Court's review and adjudication to provide constitutional doctrine and guidance to lower courts and governmental decision-makers. If left unreviewed and uncorrected, the decision of the Seventh Circuit below will subject municipal and state governments to voluminous lawsuits commenced by a roving commission of litigants in search of awards of attorney's fees under 42 U.S.C. § 1988 in the guise of enforcing "a regime of total separation . . ." between church and state. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).

In the context of twentieth century American and the history of the First Amendment, the Seventh Circuit's decision below is a stilted overreaction to a legitimate observance of the Christmas holiday season. Recognition and celebration of the Christmas season with decorations and displays is a sufficient secular purpose to pass Establishment Clause scrutiny. *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984). As does the illumination of strings of lights in this case, a creche has clear religious import that cannot be equated to Santa Claus or reindeer. *Id.*, at 685 n. 12. However, only *a* secular and not exclusive purpose is re-

quired under the first prong of the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as made unequivocally clear in *Lynch*, 465 U.S. at 681 & 681 n. 6, and *Wallace v. Jaffrey*, 472 U.S. ____, 105 S. Ct. 2479, 2490 (1985).

The notion that petitioners "established" the Christian religion is far-fetched in suggesting that a traditional Christmas holiday display of wreaths, snowmen, and a Santa Claus violates the Establishment Clause by virtue of inclusion in the display of an illumination of strings of lights in the shape of a cross on the City's fire station radio/TV antenna and crossbar brace. The illumination of lights atop the fire station communications tower celebrated the Christmas season, and served to attract holiday consumers to the the benefit of merchants in St. Charles downtown area. The strings of lights on the radio/TV antenna and crossbar brace also symbolize peace and goodwill among all persons in the context of the Christmas season.

This Court has specifically rejected a "rigid, absolutist view" of the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). The Seventh Circuit below has resurrected such a view of the First Amendment, for its approach would require removal of every headstone cross from Arlington National Cemetery, all cross insignias from the uniforms of Navy Chaplains and Red Cross personnel, and any crosses from several different stamp issues utilized by the Postal Service. *Cf. American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561, 1570 (6th Cir. 1986) (Nelson, J., dissenting); 18 U.S.C. § 706, 36 U.S.C. § 1. Notwithstanding the fact that the Seventh Circuit below reasoned that "the cross is . . . a secular decoration [for] which . . . there are many equally or more decorative substitutes . . . ," the words of the Establishment Clause and this Court's prior holdings do not require petitioners

to abandon or sanitize part of their traditional Christmas holiday lighting display. *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J.) ("celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose").

Though acknowledging that the core purpose of the Establishment Clause is to prevent government from "setting up an establishment church (like the Church of England)," *see* Appendix, at p. 6a, the Seventh Circuit below held that petitioners' inclusion of strings of lights on the radio/TV antenna and crossbar brace as part of its traditional, award-winning, commercially successful Christmas holiday lighting display was "an attempt to establish Christianity as the officially recognized religion of St. Charles." *Id.*, at p. 18a. With respect to the second prong of the three-part purpose, effect, and entanglement[1] test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the Court of Appeals focused exclusively on the religious significance of the cross-like shape of one part of a decoration in petitioners' traditional Christmas display, thereby concluding that the display could have no possible effect other than "governmental support for Christianity. . . ." *See* Appendix, at p. 9a.

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[1] The Court of Appeals did not discuss the district court's finding that there was no excessive entanglement between government and religion, inasmuch as volunteer firemen decided to install the strings of lights on the radio/TV antenna and crossbar brace, no public funds were spent to maintain the lights, and private donations covered the cost of electricity to illuminate the lights during the month-long holiday celebration. Hence, the Seventh Circuit left undisturbed the district court's finding that the inclusion of the illuminated strings of lights on the radio/TV antenna and crossbar brace in petitioners' Christmas holiday lighting display "fell far short of Pawtucket's purchase, erection, and illumination of the creche approved in *Lynch* [*v. Donnelly*, 465 U.S. 668 (1984)]." *See ACLU v. City of St. Charles*, 622 F. Supp. 1542, 1546 (N.D. Ill. 1985).

As in *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984), the conclusion that the effect of illumination of strings of lights was to promote Christianity is clearly erroneous and based upon unsound doctrine. There is no constitutional infirmity in petitioners' traditional Christmas lighting display, admittedly "a legal question to be answered on the basis of judicial interpretation of social facts." *Id.*, at 694 (O'Connor, J., concurring). The string of lights illuminated on the radio/TV antenna and crossbar brace in this case has no more effect as a recognition of religion in general or the Christian faith in particular than governmental conduct found constitutional by this Court such as the expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, *Board of Education v. Allen*, 392 U.S. 236 (1968); the expenditure of public funds for transportation of students to church-sponsored schools, *Everson v. Board of Education*, 330 U.S. 1 (1947); federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, *Tilton v. Richardson*, 403 U.S. 672 (1971); noncategorical grants to church-sponsored colleges and universities, *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); tax exemptions for church properties, *Walz v. Tax Commissioner*, 397 U.S. 664 (1970); and mandatory closing laws, *McGowan v. Maryland*, 366 U.S. 420 (1961).

In *Marsh v. Chambers*, 463 U.S. 783, 791 (1983), this Court held that the regular practice of conducting official prayers at the opening of a legislative session did not violate the Establishment Clause since the prayers were "simply a tolerable acknowledgement of beliefs widely held among the people of this country." Although "prayer is fundamentally and necessarily religious," *id.*, at 810 (Brennan, J., dissenting), Establishment Clause doctrine

contemplates that governmental conduct may result in indirect, remote, or incidental benefit upon religion. When measured by these principles, the decision below is an overreaction to the "fears and political problems" that gave rise to the Establishment Clause of which there are far less concern today. *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984). *See also Wolman v. Wolter*, 433 U.S. 229, 263 (1977) (issues under the Establishment Clause must be kept "in perspective," since the nation is "quite far removed from the dangers that prompted the Framers") (Powell, J.). The purpose of the Establishment Clause is deprecated when its meaning is tortured to forbid a city's traditional Christmas lighting display on the grounds that illumination of the lights for a few hours each evening poses a danger of establishment of a state church, whereas respondents have no objection to the radio/TV antenna and crossbar brace when it is not illuminated. Petitioners submit that their illumination of strings of lights on their fire station radio/TV antenna and crossbar brace during the Christmas holiday does not establish religion in violation of the First Amendment.

II.

THIS COURT SHOULD REFORMULATE A TEST FOR DETERMINING WHEN GOVERNMENTAL CONDUCT IS IMPERMISSIBLE UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

This Court has recognized that the three-part purpose, effect, and entanglement test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), lacks adequate standards for deciding Establishment Clause cases and leads to inconsistencies in constitutional adjudication. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). Members of this Court also have criticized the *Lemon* analysis as lacking

historical support and "all but useless as a guide to sound constitutional adjudication." *Wallace v. Jaffree*, 472 U.S. ____, 105 S. Ct. 2479, 2517 (1985) (Rehnquist, J., dissenting). Moreover, a call for reassessment of the Establishment Clause and reconsideration of this Court's precedents has been suggested and deemed urgent by other members of this Court. *Id.*, at 2497 (O'Connor, J., concurring); *id.*, at 2508 (White, J., dissenting).

The issues arising under the First Amendment in this case present this Court with the opportunity to re-examine the proper contours, purpose, and focus of the Establishment Clause doctrine. This question was presented but left unresolved in *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd without opinion by an equally div'd court sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, 472 U.S. ____, 105 S. Ct. 1859 (1985), with the result being further uncertainty in the lower federal courts and lack of guidance to governmental decision-makers. *Compare American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986) *with McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984).

The issues in this case are in an area of constitutional inquiry in need of this Court's authoritative voice, since current reliance upon "the criteria identified in *Lemon* . . . has led to results . . . 'contrary to the long-range interests of the country.' " *Aguilar v. Fenton*, 473 U.S. ____, 105 S. Ct. 3232, 3249 (1985) (Burger, J., dissenting). The long-range interests of the United States in the permissible but inevitable interaction of religion and government warrant the granting of the petition for a writ of certiorari in this case.

CONCLUSION

For these reasons, petitioners request this Court to issue a writ of certiorari to review the holding of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1007

AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, KATHRYN GIUNTOLI, and JOAN MARKLEY,

Plaintiffs-Appellees,

v.

CITY OF ST. CHARLES and FRED T.L. NORRIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 9917—**James F. Holderman,** *Judge.*

ARGUED MAY 14, 1986—DECIDED JUNE 6, 1986

Before POSNER and EASTERBROOK, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

POSNER, *Circuit Judge.* For many years, the government of St. Charles, a city outside of Chicago, has between Thanksgiving day and New Year's day festooned a six-acre area of trees and public buildings with colored lights to celebrate Christmas. The display includes Christmas trees, wreaths, snowflakes, reindeer, Santa Claus, and

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* Hon. William J. Campbell, of the Northern District of Illinois, sitting by designation.

other common Christmas symbols, but it also includes (and has for 15 years) a cross. On top of the fire department (a three-story building, clearly marked as the fire department) is a 35-foot-high television aerial. About three-fifths of the way up the aerial is an 18-foot metal cross-bar, which is no longer a functional part of the aerial. When lit up at night the aerial and cross-bar form the unmistakable symbol of Christianity. Although only a part of the municipal Christmas display, it is a prominent part. At 75 feet above street level it is one of the tallest structures in St. Charles, and there was evidence that it is several hundred feet away from any other structure of comparable height. One of the individual plaintiffs testified that the lighted cross "is an overpowering feature of the Christmas decorations that are in that area," and both testified that there is no taller object in the city's Christmas display.

Shortly before the cross was to be lit for the 1985 Christmas season, two residents of St. Charles, and an association to which they belong, sued the city and its mayor under 42 U.S.C. § 1983 to enjoin the lighting of the cross. One of the individual plaintiffs is a Methodist who is offended by what she regards as a display inconsistent with the separation of church and state; the other, though raised as a Christian, is a nonbeliever. Affidavits attached to the motion for preliminary injunction attest that the individual plaintiffs were so offended by the lighted cross that they departed from their accustomed routes of travel to avoid seeing it. They argue that the display of the lit cross (unlit it is just an aerial) is an establishment of religion forbidden by the First Amendment to the Constitution, which the Supreme Court has held to be applicable to the states by virtue of the Fourteenth Amendment. The district judge granted a preliminary injunction against lighting the cross, and the town and its mayor (the defendants) appeal under 28 U.S.C. § 1292(a)(1).

The first question we consider is the plaintiffs' standing to maintain this suit; since the American Civil Liberties Union alleges no injury to itself, its standing depends on

that of its members, the individual plaintiffs. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 476 n. 14 (1982). In most suits to enforce the establishment clause the plaintiff is a taxpayer complaining about the use of tax revenues to finance an activity that supports religion or a particular denomination or faith. See, e.g., *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216, 3221 n. 5 (1985). The complaint in this case alleges that the individual plaintiffs are taxpayers but not that any part of the expense of the cross is paid for out of tax revenues; hence the plaintiffs' status as taxpayers is irrelevant. As a matter of fact the lights are put up by the city's volunteer firemen, on their own time, and the minuscule cost of the electricity required to keep the lights lit is defrayed by voluntary contributions from city residents. (The record doesn't show who owns the lights.) Conceivably the city incurs some expense in maintaining the cross-bar, whose principal and perhaps only use at present is to complete the skeleton for the lighted cross; but this is not the basis on which the plaintiffs claim to have standing, and there is evidence that the cross-bar helps to brace the aerial. Nor do the plaintiffs suggest that if the aerial with cross-bar were not used as a lighted cross the city might lease it for commercial or other private display at Christmas and is therefore forgoing public revenues by not doing so.

The fact that the plaintiffs do not like a cross to be displayed on public property—even that they are deeply offended by such a display—does not confer standing, see *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., supra*, 454 U.S. at 485-87; *Diamond v. Charles*, 106 S. Ct. 1697, 1706 (1986); *Allen v. Wright*, 104 S. Ct. 3315, 3326-27 (1984); *Brashich v. Port Authority*, 484 F. Supp. 697, 701-03 (S.D.N.Y. 1979), aff'd without opinion, 628 F.2d 1344 (2d Cir. 1980), for it is not by itself a fact that distinguishes them from anyone else in the United States who disapproves of such displays. To be made indignant by knowing that government is doing something of which one violently disap-

proves is not the kind of injury that can support a federal suit. *People Organized for Welfare & Employment Rights v. Thompson*, 727 F.2d 167, 171 (7th Cir. 1984). Maybe it ought to make a difference if (as here) a plaintiff is complaining about the unlawful establishment of a religion by the city, town, or state in which he lives, rather than about such an establishment elsewhere; he might be intensely distressed to find himself living in a jurisdiction that had an established church. But there is no need to get into degrees of distress, because distress is not the only injury that the individual plaintiffs in this case claim to have suffered. They say they have been led to alter their behavior—to detour, at some inconvenience to themselves, around the streets they ordinarily use. The curtailment of their use of public rights of way is similar to the alleged curtailment of the plaintiffs' use of the national parks in *United States v. SCRAP*, 412 U.S. 669, 688-89 (1973). The cost in this case is no doubt slight, but it was even slighter in *SCRAP*; and the willingness of plaintiffs (or even just one plaintiff, as we shall see) to incur a tangible if small cost serves to validate, at least to some extent, the existence of genuine distress and indignation, and to distinguish the plaintiffs from other objectors to the alleged establishment of religion by St. Charles.

To the argument that the plaintiffs have inflicted this cost on themselves and can avoid it by continuing to follow their accustomed routes and shrugging off the presence of the lighted cross, the decision in *Abington School Dist. v. Schempp*, 374 U.S. 203, 224 n. 9 (1963), is a complete reply. The Court held that schoolchildren and their parents had standing to complain that the reading of the Bible and the recitation of the Lord's Prayer in the public school which the children attended violated the establishment clause. That the injury to the plaintiffs could have been averted by the parents' taking their children out of public school and putting them in a secular private school did not deprive the plaintiffs of standing. See also *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, *supra*, 454 U.S. at 486 n. 22.

Behind the result in *Schempp* lies the practical recognition that if the injury, tenuous though it be, suffered by the involuntary audience for a display alleged to constitute an establishment of religion does not confer standing to sue, there will be no judicial remedy against establishments of religion that do not depend on public funds. Suppose the City of St. Charles conceived, proclaimed, organized—in a word, established—the "Church of St. Charles" but appropriated no moneys for its support, counting instead on voluntary contributions to pay for the acquisition and upkeep of the city's religious edifices and the salaries of its ministers, and suppose that as a result of this establishment a resident of the city, deeply offended, moved away. If he lacked standing to attack the establishment, no one would have standing. This would not matter if the Supreme Court took the view that violations of the establishment clause are not justiciable in the absence of public expenditures (after all, not all violations of the Constitution are justiciable, see, e.g., *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937)), but quite obviously the Court does not take that view, and that is conclusive of the issue of standing in this case as it was in *Schempp*. A more elaborate discussion of the issue, reaching the same conclusion, is found in *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1102-09 (11th Cir. 1983), a case with facts much like those of the present case. See also *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985); *Bell v. Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1398-99 (10th Cir. 1985).

At the preliminary injunction hearing only one of the two individual plaintiffs testified that she detours from her accustomed route to avoid the cross when it is lit. But one plaintiff is all that is needed to enable the suit to be maintained, and anyway the test for standing, as for jurisdiction generally, is the good-faith allegations of the complaint, rather than what the evidence shows. *South East Lake View Neighbors v. Department of Housing &*

Urban Development, 685 F.2d 1027, 1034 (7th Cir. 1982). If a plaintiff merely fails to *prove* injury, his failure goes to damages (or in an equity case like this, to the right to obtain an injunction), rather than to jurisdiction. Otherwise the consequence of a failure to prove actual or threatened injury would not be a judgment on the merits for the defendant but a dismissal on jurisdictional grounds that might allow the plaintiff to start the suit over again. See *Ross v. Inter-Ocean Ins. Co.*, 693 F.2d 659, 663 (7th Cir. 1982).

So let us turn to the merits, where the first thing to note is that a judge asked to grant a preliminary injunction is put in the awkward position of having to make a judgment, with potentially serious consequences for the litigants and perhaps others as well, on an incomplete, because hastily compiled, record. If he erroneously grants the injunction he imposes an unjust harm on the defendant, but if he erroneously denies it he imposes an unjust harm on the plaintiff. Which is the worse error? This depends on who is more likely to win when the full trial on the merits is held and who is more likely to be hurt (and how much) by the decision on preliminary relief. If the plaintiff is likely to win, and (alone or with other persons) is likely to sustain greater injury if the injunction is denied than the defendant (along with any other persons aligned with him) is likely to sustain if it is granted, the case for the injunction is made. *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 598 (7th Cir. 1986). We need consider no other possibilities, as this is the one that best describes this case. We emphasize, however, that the discussion that follows is based on the incomplete record of the preliminary injunction proceedings; the full trial on the merits may support a different conclusion. See *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

The original purpose of providing that Congress "shall make no law respecting an establishment of religion" was to prevent the national government from setting up an established church (like the Church of England), that is,

a church financed and controlled by government and accorded privileges denied other religious groups. See *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815); McConnell, *Accommodation of Religion*, 1985 S. Ct. Rev. 1, 20-21; Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses*, 20 Wake Forest L. Rev. 569, 575-634 (1984). The establishment clause was designed to secure the religious liberties of those people who did not belong to whatever denomination might have become the national church. Congress was not to take sides in the competition among religious groups.

The town council of St. Charles, Illinois, is not the Congress of the United States, and displaying a cross on a public building during the Christmas season is not the establishment of a denomination, or even of Christianity in general, in any literal sense. As noted before, the display cost the taxpayers of St. Charles nothing. But these considerations cannot be conclusive. Not only has the establishment clause for almost fifty years been held applicable to state and local government as well as to Congress and other federal organs (see, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)); during this period it has been held to forbid acts of establishment remote from the contemplation of the framers of the clause and the framers of the Fourteenth Amendment.

When the Bill of Rights was adopted, several of the states still had established churches. See 1 Ahlstrom, A Religious History of the American People 460-61 (1975). By the time the Fourteenth Amendment was adopted in 1868, the state churches had been disestablished (Massachusetts' was the last to go, in 1833, see 1 *id.* at 461); yet the nation was more rather than less religious than it had been in the late eighteenth century, at least if one can judge by church membership. See Latourette, A History of Christianity 1230 (1953). Not only Abolitionism, but the Civil War itself, had both drawn on and stimulated religious emotions and expression. See 1 Ahlstrom, *supra*, at 35; 2 *id.* at 117-26; Van Alstyne, *Trends in the*

Supreme Court, 1984 Duke L.J. 770, 786; Wilson, Patriotic Gore 90-106 (1962). One has only to think of the "Battle Hymn of the Republic," and of Lincoln's second inaugural address, with its pervasive religious imagery (as in: "Yet, if God will that [this mighty scourge of war] continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said 'the judgments of the Lord, are true and righteous altogether' "). As late as 1892 the Supreme Court could state in the manner of a truism, "this is a Christian nation." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892). And while there is no great difficulty in imagining that religious liberty is one of the liberties that the Fourteenth Amendment forbids states to deprive persons of without due process of law, there is some semantic as well as historical difficulty in equating a law aiding religion, or even a particular denomination, to a law depriving persons of their religious liberty. Howe, The Garden and the Wilderness 73 (1965).

The modern Supreme Court, however, has treated the establishment clause as a directive to the courts to strike down all public acts, federal, state, and local, whose primary purpose or predominant effect is to promote one religious group at the expense of others or even promote religion as a whole at the expense of the nonreligious—a position that in effect treats the nonreligious as a sect, the sect of nonbelievers. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The Court's approach is illustrated by *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), which held that a state statute requiring the posting of a copy of the Ten Commandments on the wall of every public school classroom in the state violated the establishment clause, even though the copies had been bought with private contributions.

Tested by the standard of these cases St. Charles must lose, at least on the record compiled so far (an essential

qualification that we shall now stop repeating). The plaintiffs testified—what is anyway obvious—that the Latin cross (a cross whose base stem is longer than the other three arms) is a symbol of Christianity. It is, indeed, the principal symbol of Christianity as practiced in this country today. When prominently displayed on a public building that is clearly marked as and known to be such, the cross dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be. Such a display is not only religious but also sectarian. This is not just because some religious Americans are not Christians. Some Protestant sects still do not display the cross (though few Protestants would say any longer, "The sign and image of the cross is now, as of old, in the forefront of the pagan assault upon the simplicity of the faith of God in Christ," Ward, History of the Cross iii (1871)). The Greek Orthodox church uses as its symbol the Greek (equilateral) cross, not the Latin cross. Even today the establishment clause is not so strictly interpreted as to forbid conventional nonsectarian public invocations of the deity, a standard example being the slogan on U.S. currency and coins: "In God We Trust." See *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984); 31 U.S.C. §§ 5112(d)(1), 5114(b); cf. *Marsh v. Chambers*, 463 U.S. 783 (1983). But the more sectarian the display, the closer it is to the original targets of the clause, so the more strictly is the clause applied. The display of the cross, at least in the circumstances revealed by the record of this case, is sectarian.

The city places almost the whole weight of its argument on *Lynch v. Donnelly*, *supra*, which allowed the town of Pawtucket, Rhode Island to include in its Christmas display a Nativity tableau (creche). The Nativity scene, with its figures of Mary, Joseph, the infant Jesus, the Magi, shepherds, angels, and animals, is an unequivocal Christian symbol, unlike the Christmas tree and the reindeer and the tinsel and Santa Claus; and the City of St. Charles argues that there is consequently no difference between including the Nativity scene in a Christmas display and

including the cross. But there is a difference. Christmas is a national holiday, celebrated by nonobservant Christians and many non-Christians, as well as by believing Christians. It owes its status, in part anyway, to the fact that most Christmas symbology either is unrelated to Christianity or is no longer associated with it in popular understanding. There is nothing distinctively Christian about reindeer, Santa Claus, gift-giving, eggnog, tinsel, toys, retail sales, roast goose, or the music (as distinct from the words) of Christmas carols. Some symbols that are Christian—such as the holly wreath, which both symbolizes Christ's hegemony (wreaths and garlands being a traditional symbol of kingship and prowess) and recalls the crown of thorns that was placed on His head before He was crucified, to mock His supposed Kingship, see Matthew 27:29 ("And when they had platted a crown of thorns, they put it upon his head, and a reed in his right hand: and they bowed the knee before him, and mocked him, saying, Hail, King of the Jews!"); Auld, Christmas Traditions 104-05 (1932)—have lost their Christian connotations. They are regarded by most people, including most Christians, as purely decorative. Like the wreath, the Christmas tree has a buried religious connotation, through an association (unknown to most people) with the Tree of Life in the Garden of Eden. See Crippen, Christmas and Christmas Lore 153 (1923); II Encyclopaedia Britannica: Micropaedia 904 (15th ed. 1975). Another hidden linkage is the fact that evergreen trees are a traditional symbol of eternal life. *Id.* The five-pointed star of Bethlehem, while unmistakably a part of the story of the birth of Jesus Christ, is the same star used in the American flag, and in many other secular settings; it, too, has lost its religious connotations for most people.

But the Latin cross has not lost its Christian identity, though some other crosses have. (The cross is of course an ancient and variform religious symbol. See Blake, The Cross (1888).) The Red Cross has lost the religious connotation it once had, as has the Iron Cross (a Maltese—eight-pointed—cross that is the principal German military

decoration); but these are not shaped like the Latin cross. So, of course, has the swastika, to us the symbol of anti-Christian Nazism but to early Christians a veiled symbol of the cross. See III Encyclopaedia Britannica, *supra*, at 256. The crosses burned by the Ku Klux Klan are Latin crosses; and the burning cross, symbol of bigotry that it is, continues to remind of the Christian symbol that the Klan has appropriated to its sinister purposes. The St. Charles cross unmistakably signifies Christianity, as the reindeer and Santa Claus, and even the star and the wreath, do not.

The Nativity scene is a mixed case. A vivid tableau of the birth of Jesus Christ, it brings Christianity back into Christmas, unlike the star and the wreath and the tree, which for most people are in the nature of lifeless metaphors—like "caesarian section," an expression used by most people without thinking of Julius Caesar, or, coming closer to the subject of this opinion, "inferno," used without thinking of the infernal region, i.e., Hell, or "*Santa* Claus," or "City of St. Charles" itself, or "Santa Cruz," California ("Holy Cross"). The Nativity scene is an unmistakable reminder of the holiday's religious origins. Yet it does not follow that its inclusion in a Christmas display lacks secular purpose, or that its predominant effect is to promote Christianity. See *Lynch v. Donnelly*, *supra*, 465 U.S. at 680-82. As Justice O'Connor explained in her concurring opinion in *Lynch*, once it is conceded that the government can celebrate Christmas as a public holiday, despite its religious origins and continued religious significance to believing Christians, the inclusion of the Nativity scene in the celebration is seen to serve a secular purpose—"celebration of a public holiday with traditional symbols," *id.* at 693—and therefore "cannot fairly be understood to convey a message of government endorsement of religion." *Id.* One may question whether the second proposition follows from the first; the purpose could be secular, but the dominant effect to promote Christianity. Yet maybe not, where as in the *Lynch* case the Nativity scene is mixed in with the other traditional symbols of

Christmas, most of which either never had or have lost their Christian connotations.

Even if the inclusion of the Nativity scene has some effect in promoting Christianity (which, realistically speaking, it does), the Supreme Court may have felt that the effect was not great enough to warrant the mutilation of traditional Christmas displays in order to remove every trace of religion from Christmas. The "wall of separation" is not so impermeable as to require that the manger be shown empty, or the Magi and the shepherds be shown standing rather than kneeling, or Mary shown without a child, or "Nativity" be spelled with a small "n" or the angels purged from the scene. Our culture has taken much of the Christian flavor out of Christmas. Christianity took the idea of a holiday coinciding with the winter solstice (along with much symbology) from the pagans (Romans, Persians, Celts, others, see, e.g., Auld, *supra*, ch. 1; Crippen, *supra*, at 8); and some would say that the pagans have had their revenge. But the establishment clause does not require that the remaining traces of Christianity be banished from public celebrations of Christmas. The spirit of Scrooge does not inform the establishment clause.

The district judge found, however—we cannot say clearly erroneously—that the cross is not a traditional Christmas symbol. None of the books we have been able to find on the history of Christmas lists "cross" as an index entry. See Auld, *supra*; Crippen, *supra*; Dawson, Christmas (1902); Miles, Christmas in Ritual and Tradition (1912); Wernecke, Christmas Customs Around the World (1959). The reason is easy to see. The cross was a device for inflicting a slow and painful death on traitors, pirates, and other serious miscreants. The device that the Romans used to execute Christ, it became the symbol of death, resurrection, and salvation, not of birth—of Easter not of Christmas. See 4 Encyclopaedia of Religion and Ethics 328 (1912). It is "the principal symbol of the Christian religion, recalling the crucifixion of Jesus Christ and the redeeming benefits of his passion and death." III Encyclopaedia Britannica, *supra*, at 256. Of course without

the birth of Jesus there would have been no resurrection and salvation; and hence the joy of Christmas to believing Christians is inseparable from the salvation of man, symbolized by the cross. Christmas and the crucifixion are also linked indirectly by the legend that the cross on which Jesus was crucified was made out of the Tree of Life, from which the Christmas tree derives as we have seen. See Crippen, *supra*, at 153. But this is a linkage of which not one American in 10,000, we would guess, is aware.

When Christmas is considered in its secular signification, as a public holiday for Americans of whatever system of religious belief (or nonbelief), the introduction of the cross into the Christmas celebration strikes a discordant chord; for most Americans do not like to think about death in connection with birth. At any rate the cross is not in fact a common Christmas symbol, as far as any member of this panel is aware or the record shows. Its absence from Christmas celebrations may indeed be one of the reasons why Christmas is a national holiday celebrated by most Americans regardless of their religious affiliation. Whether or not you believe in the divinity of Jesus Christ, you cannot fail to be moved by the story of his birth in a manger as told in the New Testament and recalled by Christmas music, pageants, and displays, such as the Nativity tableau; in the words of Auld, *supra*, at 9, writing with great reverence, "Essentially, Christmas is the festival of childhood." But the story of the death and resurrection of Christ, the story that the cross calls to mind, moves only Christians deeply. For others it is the symbol of a system of belief to which they do not subscribe. The Mayor of St. Charles testified that a Lutheran pastor had suggested that the lighted cross be changed to a lighted star because the star was "not identified so strongly as a Christian emblem."

St. Charles concedes that if it lit the cross on the roof of the fire house year round, it would be violating the establishment clause; and if as the district judge found the cross is not a traditional Christmas symbol—if it is

the symbol not of Christmas but of Christianity—then it cannot gain the shelter of the lawful Christmas displays that adjoin it. The evidence indicates that the cross occupies a highly prominent place in the display, that it is integrated with the other components of the display only in the sense that it is one more lighted structure, and that it is understood to signify public support for Christianity rather than celebration of the Christmas season. The amount of support may not be great but it is greater than in *Lynch*; and precisely because the cross is not a traditional symbol of Christmas the injunction issued by the district judge does not require the mutilation of traditional Christmas symbology, as an injunction against a Nativity scene would.

The district court's assessment of the likelihood of the plaintiffs' prevailing when the case is tried in full is supported by a number of cases in which displays of the cross by public bodies have been held to violate the establishment clause. See *Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1985); *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, *supra*, 698 F.2d at 1110-11; *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 928 (3d Cir. 1980); *Libin v. Town of Greenwich*, 625 F. Supp. 393, 397-400 (D. Conn. 1985); *Greater Houston Chapter of American Civil Liberties Union v. Eckels*, 589 F. Supp. 222, 234-35 (S.D. Tex. 1984); cf. *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 587 P.2d 663 (1978) (establishment clause of state constitution). There are factual differences between these cases (except *Fox*, which was decided however under the more strictly worded establishment clause of the California constitution, and *Libin*) and ours, but not ones that help the City of St. Charles. In *Friedman*, for example, the cross appeared on the city's seal, and since the county in which the city was situated had been founded by Franciscan priests the display had a historical as well as religious significance; the only significance of the St. Charles cross, at least so far as the present record discloses, is religious.

Several state cases have allowed displays of the cross, but in circumstances significantly different from those of the present case. *Eugene Sand & Gravel, Inc. v. City of Eugene*, 276 Ore. 1007, 558 P.2d 338 (1976), allowed the display of a cross as a war memorial, finding that the cross is a traditional memorial and grave marker for men who have fallen in action. The cross in *Meyer v. Oklahoma City*, 496 P.2d 789 (Okla. 1972) (a case decided, by the way, under the Oklahoma constitution, which contains a more narrowly worded prohibition of establishment than the federal constitution), was in the midst of a fair grounds, and the court said that the "commercial setting in which the cross now stands and the commercial atmosphere that obscures whatever suggestions may emanate from its silent form, stultify its symbolism and vitiate any use, benefit or support for any sect, church, denomination, system of religion or sectarian institution as such." *Id.* at 792-93. No similar finding is compelled by the record of the present case. In *Paul v. Dade County*, 202 So. 2d 833, 835 (Fla. Dist. Ct. App. 1967), the record did "not indicate that this temporary string of lights forming a cross was used to support, aid, maintain or establish any religion or religious edifices." The plaintiffs in the present case corrected that evidentiary omission.

And since the plaintiffs showed they are likely to succeed on the merits when a full trial is held, they were entitled to the preliminary injunction unless the irreparable harm to the defendants from the injunction is so much greater than the irreparable harm would be to the plaintiffs if the injunction were denied that it would be on balance a worse error to grant the injunction than to deny it even though the plaintiffs have (at least at this juncture) a stronger case on the merits. The plaintiffs rely heavily on the statement in *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion), that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." The statement was made, however, in the context of free speech, and seems based not only on the high value that the courts

assign to the right of free speech but also on the more mundane consideration that speech delayed may be speech destroyed; political speech (such as involved in *Elrod*) often is addressed to transitory issues, and becomes stale when the issues pass away. See *id.* at 374 n. 29. Religious freedom is as precious as free speech, but the plaintiffs do not argue that the St. Charles cross infringes their religious freedom. They are offended by the cross, but since indignation is not an injury that can confer standing to sue, it is not clear that it can be an element of the threatened harm on which a request for a preliminary injunction is based. And if it cannot be, then it may seem that all that the plaintiffs can complain of—and only one of them, at that—is the inconvenience of having to drive a couple of blocks out of her way in order to avoid the sight of the cross when it is lit up.

But something must be missing in this analysis, for it implies—what no one believes—that cases brought under the establishment clause are inconsequential (even when there is taxpayer standing, the amounts of money involved are often trivial: $20 a year in the *Lynch* case, for example). In order to keep down the amount of litigation and to steer the control of litigation to the persons most immediately affected—so that a suit to enjoin the St. Charles cross is brought by residents of St. Charles who have incurred some though maybe only slight inconvenience, rather than by residents of Pasadena who read about the St. Charles cross in the *Los Angeles Times* (cf. *Allen v. Wright, supra*, 104 S. Ct. at 3327)—the rules of standing confine the right to sue to persons who can show something akin to a common law injury, that is, an injury to person or property. See *People Organized for Welfare & Employment Rights v. Thompson, supra*, 727 F.2d at 171, and cases cited there. The injury here is to the free use of the city's streets and sidewalks. The limitation as to who may sue is due not to some idea that the injury inflicted by violations of the establishment clause is inconsequential but to the fact that it is such a diffuse injury

that a choice among potential plaintiffs is necessary. The doctrine of standing is the mechanism of choice. But the diffuse injury is not thereby made irrelevant. It affects the public interest, a traditional element in the determination whether to grant a preliminary injunction. See, e.g., *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 382-83, 388 (7th Cir. 1984). If preliminary injunctions were not available in cases brought to enforce the establishment clause, government might be able to erode the values that the clause protects with a flood of temporary or intermittent infringements.

We conclude that in considering whether the plaintiff in a case under the establishment clause has shown irreparable harm, and how much, the court is not confined to the particular harm on which the plaintiff's standing to sue is based; it can consider the effect of the defendant's conduct on the interests protected by the clause if the injunction is not granted. Although the district court did not assess that larger impact here, there clearly is some, and therefore the inconvenience that one of the individual plaintiffs will suffer if the cross is lit next Christmas (for no one can be certain that the full trial on the merits will be completed by then—no trial date has been set and the parties have told us that they may want to conduct pretrial discovery) understates the amount of harm to society if the preliminary injunction is denied. The harm is irreparable as well as substantial because an erosion of religious liberties cannot be deterred by awarding damages to the victims of such erosion; most of those victims do not even have standing to sue. The trivial inconvenience suffered by one of the plaintiffs is only a small fraction of the potential harm inflicted by the defendants' alleged violation of the establishment clause.

As for irreparable harm to the defendants, this may well be zero. Their main argument on the merits is that the St. Charles cross is just another Christmas symbol. If so it can be replaced, with no loss of value—entertainment value, tourist-attracting value—by a star or a reindeer or

a Santa Claus. The truth of course is that the principal harm from the injunction is to those Christian residents of St. Charles who want to see the prime symbol of Christianity prominently displayed. This might not seem the kind of harm that should be taken into account in deciding whether to enjoin a government act that promotes religion. The First Amendment does not allow an establishment of religion merely because it is a popular establishment (so popular, perhaps, that it is possible to support it by voluntary contributions, without the government's having to use the coercive power of taxation). And though the case would be different if the people of St. Charles could show that the practice of their religion required that the city maintain a lighted cross, no one has tried to show this. It may seem therefore that the cross is either a secular decoration, in which event there are many equally or more decorative substitutes at hand, or an attempt to establish Christianity as the officially recognized religion of St. Charles, and that whichever it is the defendants have not shown that enjoining it will cause irreparable harm. But this takes too simple a view. It may be that the cross has a secular purpose and predominantly secular rather than religious effect but that the Christian residents of St. Charles (who are the vast majority, we may assume) derive pleasure from the display of this religious symbol. It would be a lawful pleasure, and would thus be entitled to weight in deciding whether to grant a preliminary injunction that will have the effect of eliminating the symbol until the trial on the merits is over and a final judgment entered.

But this point has no bite in the present case. The record shows that the owner of a private building near the firehouse is ready, willing, and able to display a similar cross on his building. This substitution will give the Christian residents of St. Charles all the lawful satisfaction they derive from the cross on the firehouse. The only thing they will not get is the additional, but unlawful, satisfaction of knowing that the city government is using public property to promote Christianity.

There is thus no basis on which we can disturb the preliminary injunction, and the district judge's order granting it is therefore

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 6, 1986.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, KATHRYN GIUNTOLI and JOAN MARKLEY,

Plaintiffs-Appellees,

No. 86-1007 vs.

CITY OF ST. CHARLES and FRED T. L. NORRIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 9917—**James F. Holderman**, *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

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* Honorable William J. Campbell, Senior Judge, United States District Court for the Northern District of Illinois, sitting by designation.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, KATHRYN GIUNTOLI, and JOAN MARKLEY,

Plaintiffs,

No. 85 C 09917 v.

CITY OF ST. CHARLES and FRED T. L. NORRIS,

Defendants.

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge.

This case presents the difficult and sensitive issue of whether the Establishment Clause of the First Amendment prohibits the City of St. Charles, Illinois from including an illuminated latin cross in its annual Christmas lighting display. The lighting display has been a part of St. Charles' Christmas celebration for more than fifteen years.

The plaintiffs, two St. Charles' residents and the American Civil Liberties Union of Illinois, filed this suit challenging the City's annual practice of displaying the illuminated cross. Plaintiffs seek declaratory and injunctive relief prohibiting St. Charles from displaying the illuminated cross on City property.[1] The defendants, the

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[1] The Seventh Circuit has established the criteria that must be met by plaintiffs seeking preliminary injunctive relief. Plaintiffs must establish that they have no adequate remedy at law or will be irreparably harmed if the injunction does not issue; the threatened injury to the plaintiffs outweighs the threatened harm the

(Footnote continued on following page)

City of St. Charles and its Mayor, Fred T. L. Norris, sued in his official capacity, deny that the lighted cross violates the United States Constitution.

This matter was first presented to the Court on November 27, 1985 by motion of the plaintiffs for a temporary restraining order and preliminary injunction. On the same day, the defendants, through their counsel, sought additional time to respond to the motion and voluntarily agreed not to display the illuminated cross until the hearing could be held and the Court had the opportunity to rule on the question. The hearing was held on December 2, 1985.

I. *The Setting and the Structure*[2]

St. Charles is located along the Fox River in Kane County, Illinois and has a population of approximately 18,300 people. According to the testimony of its Mayor, Fred T. L. Norris, the City, in an attempt to brighten Christmas spirits and cheer for the residents and tourists of St. Charles, has for more than 15 years sponsored a spectacular Christmas holiday lighting program. As part of this annual lighting program, the City decorates the

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[1] *continued*
injunction may inflict on the defendant; the plaintiffs have a reasonable likelihood of success on the merits; and the granting of a preliminary injunction will not disserve the public interest. *Roland v. Air Line Employees Ass'n, International*, 753 F.2d 1385, 1392 (7th Cir. 1985). Plaintiffs have satisfied that burden here. *See generally Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

[2] To assist the Court the plaintiffs introduced four black and white photographs of the fire station and tower. (PX 1-4). The defendants introduced twenty-nine photographs of the St. Charles downtown and surrounding area as it appears when decorated as described below. (DX 1-29). The defendants also introduced an architect's drawing of the municipal complex area indicating the location of the various buildings. (DX 30).

main thoroughfares of St. Charles as well as the city buildings with lights and ornamentation.

On both Main Street (Route 64) and Illinois Street the City erects six foot lighted Christmas trees that are attached to the top of the street lamps that run parallel to the roadways. The street lamps and attached Christmas trees are on the public way. St. Charles is situated in the valley of the Fox River and the Christmas trees along Main Street stretch from one side of the valley to the other. The Illinois Street trees are hung in the downtown area and across the Illinois Street Bridge which spans the Fox River.

An integral part of St. Charles' lighting program is the decorations that adorn the municipal complex. The municipal complex is a six acre plot of land located in the heart of downtown St. Charles. The public buildings located in the municipal complex are the municipal center, the planning and public works building, the fire station, the public safety building and an electrical facility. All the trees in the six acre municipal complex are illuminated with strings of white lights during the holiday season.

At the southwest end of the complex sits the municipal center, a large white marble building that serves as the city hall and local museum. The two story municipal center has a large tower that extends upward for three or four stories. The tower is octagonal in shape and is topped off with a glass pyramid type structure. As part of the lighting program the sides of the tower are illuminated alternatively in green and red lights. The glass top is lighted in blue. The lighting creates a stunning display that can be seen for miles and reflects beautifully off the Fox River which is immediately to the west of the municipal complex. The street-level windows of the municipal center are also decorated and contain animated scenes associated with the holiday season. Finally, mounted along the south wall of the municipal building is a large lighted wreath with a red bow.

To the northeast of the municipal center is the planning and public works building (otherwise known as the city plant and Swanson building). The south wall of this two story structure overlooks a municipal parking lot and is visible from the streets that intersect in front of the municipal center. This wall is decorated with lighted snowflakes, a lighted snowman and a lighted Santa Claus.

Directly to the north of the planning and public works building and approximately 80 feet from the municipal center is the City's fire station. The fire station's east wall is decorated with a lighted wreath and two coach lamps which are illuminated by green and red bulbs. Multicolor lights are also strung along the east and extend around to the south face of the fire station. On the west side of the fire station, facing the Fox River, illuminated snowflakes are attached to the building. A large green illuminated wreath is mounted on the west face of the fire station's hose drying tower.

To the northwest of the fire station is the public safety building. This structure is also decorated with multicolored lights along its roof line. On the west side of the building and on the shore of the Fox River, a large twenty foot simulated Christmas tree is created with strings of green lights and is topped with a white lighted star.

There is one other decoration that appears in the municipal complex area. It is the reason for this litigation. At issue here is the string of lights attached to a communications tower on the roof of the fire station's hose drying building. The communications tower is a 35-foot, three-legged, triangular metal structure anchored in concrete on the roof of the two story hose drying tower of the St. Charles fire station. The metal communications tower is used as a television antenna and has an aerometer mounted on it for the purpose of measuring wind speed and direction. The tower also anchors a radio scanning antenna used by the St. Charles police and fire department for mobile communication. Attached to the metal tower, slightly above its midpoint, is a crossbar which

runs perpendicular to the tower and parallel to the ground. This crossbar was originally installed in 1965 and was later reinforced in 1969. It served as a ground plane radio antenna from its installation until the mid 1970's. The crossbar no longer serves any function other than as additional bracing for the metal tower. The crossbar as reinforced is about eighteen feet in width and consists of two "U" shaped pieces of ¾" conduit which have their open ends attached to the tower.

On or about the 1969 Christmas holiday season, the volunteer firemen decided to incorporate the communications tower and the crossbar into the City's annual lighting program. At that time, the volunteer firemen installed white lights on the tower and crossbar, configuring the lights in such a way as to create the appearance of a latin cross.

For nearly 15 years the City's annual lighting program went unchallenged. Last year, after the propriety of the City spending public funds to light the cross was questioned by some citizens of St. Charles, a separate meter was installed to monitor the electrical costs associated with the illuminated cross. A private citizen donated the money to pay the $23.65 in electrical costs resulting from the cross being illuminated during the holiday season from Thanksgiving 1984 to January 2, 1985. There are no other expenses associated with the cross because volunteer firemen maintain the lights on their own time and at their own expense.

This year, 1985, plaintiffs challenge through this lawsuit the constitutionality of the illuminated cross formation being displayed on City property, despite the private maintenance and funding of the cross. The plaintiffs object to no other aspect of the St. Charles holiday lighting display other than the illuminated cross on the fire station's communications tower.

II. *Discussion*

The legal issue presented by this case requires the Court to draw what the United States Supreme Court

has called the "blurred, indistinct, and variable barrier" between that which is allowed and that which is prohibited by the Establishment Clause of the First Amendment to the United States Constitution. *Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S. Ct. 2105, 2112 (1971). In accordance with the Supreme Court's approach in *Lynch v. Donnelly*, ____ U.S. ____, 104 S. Ct. 1355 (1984), this Court looks to the *Lemon* three-prong test for guidance on this sensitive and delicate line-drawing task.

The *Lemon* analysis poses three inquiries: (1) does the challenged governmental conduct have a secular purpose; (2) is the principal or primary effect of the challenged governmental conduct to advance or inhibit religion; and (3) does the challenged governmental conduct foster an excessive entanglement of government with religion. *Lemon*, 403 U.S. at 612-13, 91 S. Ct. at 2111. A negative answer to the first question or a positive answer to either the second or third questions requires the determination that the challenged governmental conduct does not pass constitutional muster.

The Court believes that the conduct challenged here, even when considered as only one part of a municipal Christmas holiday lighting display, fails to pass constitutional muster.

A. *Secular Purpose.*

In order to withstand Establishment-Clause scrutiny, governmental conduct must be motivated at least in part by secular concerns. Chief Justice Burger, writing for the majority in *Lynch*, noted that governmental activity has been struck down as unconstitutional under this prong of the *Lemon* test only when the activity "was motivated wholly by religious considerations." *Lynch, supra*, 104 S. Ct. at 1312. In *Lynch* the majority of the Supreme Court decided that the governmental purposes underlying the display of a creche depicting the birth of Jesus Christ—celebration of the public holiday of Christmas and depiction of the historical origins of the public holiday—were

sufficiently secular to satisfy the first *Lemon* requirement. As Justice O'Connor explained in her concurring opinion:

> The evident purpose of including the creche in the larger display was not promotion of the religious content of the creche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.

Lynch, supra, 104 S. Ct. at 1368.

The "purpose" inquiry is complicated in this case by the fact that the challenged symbol in St. Charles' holiday display is a latin cross, which is "distinctively religious" and "universally regarded as a symbol of Christianity." *Lynch, supra,* 104 S. Ct. at 1370 (Brennan, J., dissenting); *American Civil Liberties Union v. Rabun County Chamber of Commerce,* 698 F.2d 1098, 1110 (11th Cir. 1983). The City of St. Charles certainly intended the illuminated cross to be a part of its celebration of the Christmas holiday: the lighted cross was only one element of the City's much larger and award winning annual Christmas display of lights. If *Lynch* stands for the proposition that a celebratory purpose, no matter how religiously thematic the symbols displayed may be, suffices to pass the first *Lemon* test, then St. Charles' actions would not be constitutionally infirm under that test.

This Court hesitates, however, to read *Lynch* so broadly. As an initial matter, Justice Brennan in dissent specifically noted that the majority's opinion implicitly left open questions concerning the constitutionality of the display on public property of "distinctively religious symbols such as a cross." *Lynch, supra,* 104 S. Ct. at 1370 (Brennan, J., dissenting). Justice O'Connor's concurrence, moreover, stressed the traditional, as opposed to religious, nature of the creche at issue in *Lynch.* Because of the creche's traditional association with the Christmas holiday, Justice O'Connor was able to conclude that Pawtucket's "evident purpose" in including the creche in its annual Christmas

display was celebration, and specifically not "promotion of the religious content" of the symbol.

Such a conclusion is not as easily reached here. Unlike the creche, a cross on a building, even during the Christmas season, does not ordinarily conjure up in a viewer's mind the historical antecedents of the Christmas holiday. Indeed, many Christian church buildings display the latin cross to indicate that the building is in fact a church. For this reason, among others, a cross on a building has come to have religious meaning in our society separate from any religious holiday.

Fred T. L. Norris, Mayor of the City of St. Charles, testified that he considers a cross to be one of the traditional symbols of the Christmas holiday season. Even assuming that Mayor Norris' preception is shared by the general populace, the Court would find it difficult to take the next step, taken by Justice O'Connor, and conclude that the "evident purpose" in St. Charles' inclusion of a cross in its Christmas display was not to promote its religious message.

The Court believes, however, that it need not resolve this initial difficult question since the City's conduct fails to comply with *Lemon*'s second requirement—that the primary "effect" of governmental conduct be religion-neutral.

B. *Principal or Primary Effect.*

The second prong of the *Lemon* analysis, as articulated by Justice O'Connor, considers whether "a governmental practice [has] the effect of communicating a message of governmental endorsement or disapproval of religion." *Lynch, supra,* 104 S. Ct. at 1368. Governmental endorsement, the Justice explained:

> sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Id. at 1366. Whether or not governmental activity conveys such an endorsement is "a legal question to be answered on the basis of judicial interpretation of social facts." *Lynch*, 104 S. Ct. at 1369 (O'Connor, J., concurring).

The Court is convinced that the primary effect of including an illuminated cross in the City's annual Christmas display was to place the government's imprimatur on the particular religious beliefs associated with the latin cross. "Those who believe in the message" of the cross "receive the unique and exclusive benefit of public recognition and approval of their views." *Lynch*, 104 S. Ct. at 1373 (Brennan, J., dissenting).

The Court also believes that, unlike a creche displayed in the midst of, among other things, a Santa Claus house, clown, elephant and teddy bear, the apparent governmental endorsement of Christianity is not "negate[d]" by the overall holiday display of lights in St. Charles. *Lynch*, *supra*, 104 S. Ct. at 1369 (O'Connor, J., concurring). Unlike a creche, a cross is not commonly found displayed in the midst of purely secular symbols of the Christmas holiday. And unlike a creche which is traditionally displayed only at Christmas time, a cross is displayed yearround on buildings associated with the Christian religion (*e.g.*, churches and parochial schools) for the purpose of conveying the message that the building is associated with the Christian religion.

In short, the City of St. Charles cannot be allowed to illuminate the cross-shaped tower on top of a municipal building because such an action has the effect of conveying an association with or tacit approval of Christianity at the expense of any other religion, agnosticism or atheism. The approval and benefit conveyed by the thirty-five by eighteen foot illuminated cross beaming over the rooftops of St. Charles is more than "indirect, remote [or]

incidental . . . ." *Lynch, supra,* 104 S. Ct. at 1364.[3] A preliminary injunction must issue.[4]

C. *Excessive Entanglement*

Having found a constitutional violation, the Court will not engage in a lengthy discussion of the third prong of *Lemon*, the excessive-entanglement test. The Court will note, however, that plaintiffs' argument that the record-keeping done by the City of St. Charles to ensure that private funds were used to maintain the lighting hardly seems to constitute the "ongoing, day-to-day interaction between church and state" prohibited by the Constitution. *Lynch, supra,* 104 S. Ct. at 1364. Whatever involvement St. Charles might have had with the display of the cross, it fell far short of Pawtucket's purchase, erection and illumination of the creche approved of in *Lynch. See also McCreary v. Stone,* 739 F.2d 716, 724 (2d Cir. 1984), *aff'd by an equally divided Court,* ____ U.S. ____, 105 S. Ct. 1859 (1985).

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[3] As was held in *Fox v. City of Los Angeles,* 22 Cal.3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978), which prohibited the defendant city from illuminating a large cross on its city hall to celebrate Christmas and Easter, such conduct by a governmental body unconstitutionally identifies the body with the Christian religion.

[4] At the hearing on this matter, counsel agreed that plaintiffs' motion would be limited to one seeking a temporary restraining order. The Court believes, however, that plaintiffs' motion is best construed as one for a preliminary injunction since notice was provided to the defendants and an evidentiary hearing on the matter was held. In light of the short time period of the Christmas season, moreover, the Court believes that defendants should be afforded the right to an immediate appeal of this decison if they choose to do so, a remedy available under 28 U.S.C. § 1292(a)(1) if plaintiffs' pleading is taken as a motion for preliminary injunction.

III. *Conclusion*

The first guaranty of the Bill of Rights to the United States Constitution is freedom from any "law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." It is a foundation of our country that religion be an individual and voluntary exercise. When a governmental body adorns a public building with a religious symbol so universally identified as a symbol of one religion as is the illuminated cross on the St. Charles fire station, it exceeds the boundaries of neutral accommodation of religion. The Establishment Clause prohibits such conduct.

As well meaning as the city fathers of St. Charles may be in their holiday lighting display, the illuminated cross on the fire station tower has the effect of unconstitutionally embracing Christianity beyond the allowable limits of the First Amendment.

IT IS THEREFORE ORDERED for the reasons stated herein that the City of St. Charles is enjoined from illuminating the configuration of lights forming the shape of a cross on the communications tower attached to the roof of the St. Charles fire station pending a final adjudication of this action. Due to the extraordinary circumstances of this case, including the public-interest nature of plaintiffs' position, the Court in its discretion deems that the proper security to be posted by plaintiffs is the nominal amount of $1.00 to effectuate this order.

ENTER:

/s/ James F. Holderman
United States District Judge

DATED: December 5, 1985

Plaintiffs' Exhibit 2